

Supreme Court U. S.

FILED

DEC 19 1976

IN THE

Supreme Court of the United States

October Term, 1976

No. A-78

76-518

FRANKLIN COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

ROBERT M. PITLER
Assistant District Attorney

ROBERT M. GROSS
Criminal Law Investigator

Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Introduction	2
Defendant's Post Conviction Motions	3
The 1969 <i>coram nobis</i> application	3
The 1976 <i>coram nobis</i> application	5
Point I—Cooper has failed to show that this Court has jurisdiction to review the state court decision, and his petition should be denied	6
Point II—Cooper's contention does not present a sub- stantial federal question	9
Conclusion	10

TABLE OF AUTHORITIES

	PAGE
Cases:	
Brady v. United States, 397 U.S. 743 (1969)	7, 9
Cardinale v. Louisiana, 394 U.S. 437 (1969)	7
Durley v. Mayo, 351 U.S. 277 (1956)	6, 7, 8
Henry v. Mississippi, 379 U.S. 443 (1965)	8
Hill v. California, 401 U.S. 797 (1971)	7
Klinger v. Missouri, 13 Wall. 257 (1871)	6
Monks v. New Jersey, 398 U.S. 71 (1970)	7
People v. Calloway, 24 N.Y.2d 127 (1969)	4
People v. Cooper, 35 A.D.2d 911 (1970)	5
People v. Crimmins, 38 N.Y.2d 407 (1975)	8
People v. Kass, 33 A.D.2d 515 (1st Dept. 1969)	8
People v. Lufland, 21 N.Y.2d 746 (1968)	8
People v. Montgomery, 24 N.Y.2d 130 (1969)	4, 5
People v. O'Bryan, 26 N.Y.2d 95 (1970)	4
People v. Robinson, 38 A.D.2d 821 (1st Dept. 1972)	8
People v. Rodriguez, 31 A.D.2d 753 (2nd Dept. 1969)	8
People v. Wilder, 25 A.D.2d 889 (2nd Dept. 1966)	8
Stembridge v. Georgia, 343 U.S. 541 (1952)	6
Tacon v. Arizona, 410 U.S. 351 (1973)	7
Other Authorities:	
N.Y.C.P.L. §440.10	5
N.Y.C.P.L. §440.30	8
N.Y.C.P.L. §450.90	1
Supreme Court Rules: Rule 23(1)(f), 398 U.S. 1035	7
28 U.S.C. §1257(3) (62 Stat. 929)	6

IN THE

Supreme Court of the United States

October Term, 1976

No. A-78

FRANKLIN COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

Preliminary Statement

Franklin Cooper seeks a writ of certiorari to review a decision and order of the Supreme Court, New York County (ROSENBERGER, J.), entered February 22, 1976. By this order, the court denied Cooper's motion to vacate his guilty plea to MURDER IN THE SECOND DEGREE. The New York State Appellate Division, First Department (NUNEZ, J.), refused permission to appeal from that order on May 25, 1976. Cooper did not seek leave to appeal from the Appellate Division order to the Court of Appeals. *See*, N.Y.C.P.L. §450.90.

Introduction

By an indictment filed December 18, 1957, Franklin Cooper, Clifford Hanson and Leroy Jones were charged with murder in the first degree. Indictment No. 4009-57. All three defendants entered pleas of not guilty on January 10, 1958.

Cooper went to trial on May 13, 1958. He was represented by three attorneys assigned by the court (Alfred Norick, George Todaro and Gilbert Rosenthal) and by Peter Sabbatino, a lawyer retained by the defendant's family (T: 4-6).^{*} At Cooper's request, Sabbatino tried the case (T: 7). The court declared a mistrial on May 19, 1958, after defendant's motion, on the ground that the People had introduced evidence concerning Cooper's intent to commit a crime unrelated to the one charged in the indictment (T: 170-178).

On September 9, 1958, Cooper appeared before the Court of General Sessions, New York County (SCHWEITZER, J.). He was represented by four attorneys—Sabbatino, Norick, Todaro and Harold Frankel. Cooper withdrew his plea of not guilty to murder in the first degree and entered a plea of guilty to murder in the second degree to cover Indictment Number 4009-57. At that time, Cooper also entered a plea of guilty to robbery in the first degree to cover another charge pending against him at the time. Indictment No. 3324, 3328/57.

^{*} Parenthetical references preceded by "T" refer to the minutes of trial; references preceded by "P" refer to minutes of the 1958 plea conference; references preceded by "H" refer to the 1969 *coram nobis* hearing.

The court asked the defendant if he wished to plead guilty to the crimes of murder in the second degree and robbery in the first degree. Cooper indicated that he wished to plead guilty (P: 3). The court then inquired into the factual basis of the murder charge. Cooper acknowledged that he shot and killed Edward Dudley with a pistol during the commission of a felony (P: 3). After calling Cooper's attention to a bench conference with respect to the scope of sentence, the court asked Cooper if anyone had made him any promise which had induced him to plead guilty. Cooper indicated that no such promise had been made and that he was entering his plea willingly and voluntarily (P: 3-4).

Cooper was sentenced to a term of 20 years to life on October 21, 1958. Cooper did not appeal from this conviction and sentence.

Defendant's Post Conviction Motions

The 1969 *coram nobis* application

On August 19, 1969, Cooper moved *pro se* for a writ of error *coram nobis*. He argued that his conviction should have been set aside because he was not advised of his right to appeal from the judgment of conviction in 1958. Justice SCHWEITZER concluded that Cooper had not been told of his right to appeal at the time of his sentence on October 21, 1958. The court followed the applicable state procedure by directing that Cooper be arraigned for resentencing (H: 2-3). Where a defendant has been denied an appeal because he was unaware of his right to do so, a resentencing allows "the time to appeal [to] run anew,"

People v. Montgomery, 24 N.Y.2d 130, 134 (1969), and thereby affords a defendant a chance to perfect an appeal long after the time to do so has expired. *People v. O'Bryan*, 26 N.Y.2d 95, 96 (1970); *People v. Calloway*, 24 N.Y.2d 127, 129 (1969).

The court inquired whether Cooper had any cause to show why judgment should not be pronounced against him (H: 3). Speaking on his own behalf, Cooper stated that the proceedings were in violation of his rights under section 237 of the Code of Criminal Procedure (H: 4).^{*} The court denied Cooper's application, holding that the lapse of time since the 1958 proceedings was inherently prejudicial to the People.

Thereafter, the petitioner was given an opportunity to state further objections. After replying that he had no more exceptions, Cooper expressed the desire to speak to an attorney (H: 4).^{**} Cooper conferred with an attorney, Edward Gasthalter. When the case was recalled, Cooper was given an opportunity to state his objections to resentencing. He replied that he had only the motion which was denied (H: 5-6). Cooper was then resentenced to a minimum of twenty years and a maximum of life, *nunc pro tunc* as of the date of his original sentence, and advised of his right to appeal (H: 6-7). This was the same sentence Cooper received in 1958.

^{*} Section 237 mandated the court's appointment of a foreman for the grand jury. Section 337 set forth the guidelines for the withdrawal of a guilty plea before the imposition of sentence. Neither section of the Code authorized any form of post conviction relief.

^{**} Petitioner suggests that this desire for an attorney in 1969 reflected the state of affairs at the time of the plea and sentence in 1958. See Petitioner's Brief, 4. Taken in the context of the *coram nobis* hearing, the statement is merely indicative of Cooper's desire to consult with a lawyer for the purpose of that hearing.

On appeal Cooper contended that the case should have been remanded so that he might have elaborated upon his reasons why judgment should not have been imposed and been resentenced anew. The Appellate Division of the Supreme Court, First Department, affirmed the conviction and resentence on November 17, 1970. *People v. Cooper*, 35 A.D.2d 911.

At no time did Cooper take advantage of the resentencing to file an appeal of his original judgment of conviction.

The 1976 *coram nobis* application

In 1976, before the Supreme Court, New York County, Cooper sought once again to vacate his 1958 guilty plea by way of writ of error *coram nobis*. He alleged that he was innocent of the murder with which he was initially charged and that he was coerced by counsel to plead guilty. Cooper also alleged that his guilty plea should have been vacated after the 1969 hearing. Justice ERNST ROSENBERGER denied the motion by a decision filed February 22, 1976.

As to the 1969 hearing, the court ruled that Cooper had received the full benefit of the relief provided for by *People v. Montgomery, supra*. Addressing the petitioner's claim of innocence, the court pointed out that such a bare allegation, with nothing more, is not a ground for a motion to vacate a judgment under Criminal Procedure Law Section 440.10. The court also considered Cooper's naked contention that he did not voluntarily plead guilty and found that the minutes of the 1958 plea established that the plea was offered willingly and voluntarily. Accordingly, Cooper's petition was dismissed without a hearing.

Justice NUNEZ, of the Appellate Division, First Department, denied permission to appeal from the order of the Supreme Court on May 25, 1976.

Cooper asks this Court to grant a writ of certiorari to review Justice ROSENBERGER's February 22, 1976 order which denied petitioner's motion to vacate his judgment of conviction based on his 1958 guilty plea. He argues that since he was deprived of adequate assistance of counsel at the time of his guilty plea and sentence, his conviction should have been set aside.

Although he has served his sentence for the 1958 conviction, Cooper is now incarcerated on an unrelated matter.

POINT I

Cooper has failed to show that this Court has jurisdiction to review the state court decision, and his petition should be denied.

One who petitions this Court to review the judgment of a state court must establish that the Court has jurisdiction to do so. *Durley v. Mayo*, 351 U.S. 277, 281-82 (1956); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). Cooper states that he seeks to invoke the jurisdiction vested in this Court by 28 U.S.C. §1257(3) (62 Stat. 929). Petition at 2. Under this provision, Cooper is required to demonstrate that the federal question which he asks this Court to review "was presented to the highest court of the State having jurisdiction." *Klinger v. Missouri*, 13 Wall. 257, 263 (1871), cited in *Durley v. Mayo*, *supra*. As a second prerequisite to establishing this Court's jurisdiction, Cooper must demon-

strate that the state court decision to be scrutinized rested upon federal grounds. *See, e.g., Durley v. Mayo, supra*; Supreme Court Rules, Rule 23 (1) (f), 398 U.S. 1035.

Cooper has not, and cannot, satisfy either of these requirements. The question presented in Cooper's petition was not at issue before the Supreme Court, New York County. Nor is there any indication that the state courts, in fact, considered the federal claim Cooper now asserts in his petition.

In his 1976 *coram nobis* application, Cooper argued that he was innocent of the murder charged in the 1957 indictment and that he was coerced by counsel to plead guilty. Cooper asserts in his petition to this Court only that he was inadequately represented by counsel at the time of his plea and sentence in 1958. Cooper's contention before the state court went to the voluntariness of his plea. *See, e.g., Brady v. United States*, 397 U.S. 743, 748 (1969). At no time in the New York courts did Cooper frontally attack the competence of his lawyers' overall performance. Consequently, the New York courts have never passed on the federal question Cooper now raises in his petition. It is well established that this Court "will not decide federal constitutional issues raised * * * for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Monks v. New Jersey*, 398 U.S. 71 (1970); *Hill v. California*, 401 U.S. 797, 805 (1971); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

Moreover, the court below denied Cooper's application without reaching any federal constitutional issue. Reference to Justice ROSENBERGER's decision establishes that peti-

tioner's motion was denied without a hearing because his moving papers failed to "allege any ground constituting legal basis for the motion." N.Y.C.P.L. §440.30 (4)(a). To prevail in an application for a writ of error *coram nobis*, the petitioner must inform the court of those facts which, as a matter of law, would undermine the court's basis for its judgment of conviction. *People v. Kass*, 33 A.D. 2d 515 (1st Dept. 1969); *see, People v. Crimmins*, 38 N.Y. 2d 407, 418 (1975). In the proceedings below, Cooper's allegations of innocence and a coerced plea were both conclusory, totally lacking in factual evidence to support them. *See, People v. Wilder*, 25 A.D. 2d 889 (2nd Dept. 1966). Since the minutes of the court proceedings conclusively refuted Cooper's unsupported assertions, under state law the court properly dismissed the application without a hearing. *People v. Lufland*, 21 N.Y. 2d 746 (1968); *People v. Robinson*, 38 A.D. 2d 821 (1st Dept. 1972); *People v. Rodriguez*, 31 A.D. 2d 753 (2nd Dept. 1969).

Consequently, Cooper's application was denied because of his failure to comply with New York procedural requirements. Cooper's *coram nobis* petition failed to set forth facts which, if true, would have entitled him to relief. Thus, the court never reached the federal question which is raised by Cooper's petition. Where a state court judgment rests on "independent and adequate state grounds," it is well established that this Court will not review it. *Henry v. Mississippi*, 379 U.S. 443, 446 (1965); *Durley v. Mayo*, 351 U.S. at 281.

Cooper has failed to establish that the federal question which he asks this Court to review was presented to the New York court. Nor has he shown that the New York Supreme Court actually decided *any* federal question, much less the one he now raises in his petition.

POINT II

Cooper's contention does not present a substantial federal question.

An examination of the merits of Cooper's unsupported allegation reveals that he has presented no substantial question to this Court for review. At his trial, petitioner was represented by four attorneys. One of those lawyers, Peter Sabbatino, was retained by the defendant's relatives. At Cooper's request, Sabbatino had primary responsibility for handling the trial. The trial ended after Sabbatino's motion for a mistrial was granted.

At his plea conference several months after the mistrial, Cooper was represented by four attorneys, including Sabbatino. As a result of his plea, Cooper faced a lesser sentence on the murder charge. Moreover, he had the advantage of serving concurrent time on a pending, unrelated robbery indictment. Pleading guilty was clearly in Cooper's best interest. *See, Brady v. United States*, 397 U.S. at 749.

Cooper admitted in open court that he committed the acts charged in the indictment. There were no allegations of threats or off-the-record promises. Cooper indicated that his plea was voluntary, a product of his own free will.

On the face of the record, Cooper's attorneys spent a great amount of time in securing a final disposition which was in the best interests of their client. In any event, there is no indication that the quality of Cooper's legal assistance approached that level of incompetence which would comprise a violation of petitioner's Sixth Amendment right to assistance of counsel.

Conclusion

The petition should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

ROBERT M. PITLER
Assistant District Attorney

ROBERT M. GROSS
Criminal Law Investigator
Of Counsel

December, 1976